Supreme Court, U.S.
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No.

IN THE SUPREME COURT OF THE UNITED STATES

CECIL TURNER,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

Michael J. Gonring
Counsel of Record
QUARLES & BRADY LLP
411 E. Wisconsin Ave.
Milwaukee, WI 53202-4497
(414) 277-5000

QUESTION PRESENTED FOR REVIEW

1) Do direct deposits that would occur regardless of the charged scheme satisfy the furtherance element of 18 U.S.C. § 1343 when the charged scheme is the deliberate failure of an employee to fulfill his job responsibilities?

PARTIES TO THE PROCEEDING

Petitioner is Cecil Turner, defendant-appellant below.

Respondent is the United States of America, plaintiff-appellee below.

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PETITION FOR A WRIT OF CERTIORARI

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1A) is reported at *United States v. Turner*, 551 F.3d 657 (7th Cir. 2008). The court of appeals' order denying the petition for rehearing (Pet. App. 25A-26A) is not reported.

JURISDICTION

The court of appeals entered judgment on December 30, 2008. (Pet. App. 1A.) The court denied a timely petition for rehearing on January 28, 2009. (Pet. App. 25A.) The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Section 1343 of Title 18, United States Code, provides in relevant part: "Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than 20 years, or both."

Section 1346 of Title 18, United States Code, provides in relevant part: "For the purposes of this chapter, the term 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services."

STATEMENT OF THE CASE

This case concerns the breadth of the federal government's jurisdiction to prosecute workplace misconduct as wire fraud under 18 U.S.C. § 1343. The Court last considered the necessary connection between the use of the mail and a charged scheme under 18 U.S.C. § 1341 in *Schmuck v. United States*, 489 U.S. 705, 109 S. Ct. 1443, 103 L. Ed. 2d 734 (1989).[1] In *Schmuck,* the Court held that to be part of a fraudulent scheme, "the use of the mails need not be an essential element of the scheme." *Id.*

Since *Schmuck*, the reach of the mail and wire fraud statutes has extended. In this case, the United States Court of Appeals for the Seventh Circuit held that direct deposits of paychecks into two janitors' bank accounts was enough of a

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[1] Cases construing the federal mail fraud statute, 18 U.S.C. § 1341, are applicable to interpreting the wire fraud statute, 18 U.S.C. § 1343. *See United States v. Tarnopol*, 561 F.2d 466, 475 (3rd. Cir. 1977), *abrogated on other grounds by Griffin v. United States*, 502 U.S. 46, 112 S. Ct. 466, 166 L. Ed. 2d 371 (1991).

connection to charge three janitors and their indirect supervisor with wire fraud based on the janitors' scheme to skip work and avoid detection. The Court should take this opportunity to clarify the necessary association between the use of the wires and the charged scheme in a prosecution for wire fraud.

The court of appeals' decision demonstrates the need for clarification. The court's decision renders relatively common workplace abuses prosecutable as wire fraud by making the requirement that wire communications are used "for the purpose of executing such scheme" – generally referred to as the "furtherance" requirement – a mere formality, and by concluding that failing to fulfill one's employment duties is property, rather than honest services fraud. The decision means that an employee who takes sick leave when he is not sick and receives his paycheck by direct deposit commits wire fraud; an employee who takes too many or excessively long breaks and receives his paycheck by direct deposit commits wire fraud and an employee who purposefully fails to fulfill any of his job responsibilities and receives his paycheck by direct deposit commits wire fraud. Likewise, as this case demonstrates, supervisors of such employees also are potentially guilty.

Given the percentage of workers who receive their paychecks by direct deposit, the time is ripe for the Court to clarify whether receiving a paycheck by direct deposit extends the reach of wire

fraud to any workplace misconduct where an employee's job responsibilities go unfulfilled.

I. Background Facts

This case concerns three night janitors employed by the state of Illinois – Dana Dinora, David Medvesek and Steven Boyce – who failed to work as often as their jobs required, yet recorded their hours as if they were fulfilling their duties. (R. 67, Pet. App. 27A-28A.) Dinora, Medvesek and Boyce were responsible for providing janitorial services between the hours of 3:00 p.m. and 11:00 p.m. at state office buildings in Springfield, Illinois, including the Herndon Building and the Court of Claims building. (R. 67, Pet. App. 30A-31A.) The three were indicted and pleaded guilty to wire fraud based on their scheme to deceive supervisors and others as to their failure to fully perform their jobs. (T. 222, 435, 481.)[2] Cecil Turner was indicted and convicted for aiding and abetting the janitors by hindering the supervisors of Dinora, Medvesek and Boyce from investigating and disciplining the three janitors and for depriving the State of Illinois of his honest services. (R. 77.) Turner also was indicted and convicted of making false statements to the FBI during its investigation of the scheme. (R. 77.)

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[2] The trial transcript is included in the record on appeal at R. 147-150. For simplicity, we will cite to the transcript by page number using the designation "T."

A. Turner's Job Responsibilities

Turner became the Director of the Division of Physical Services for the Illinois Secretary of State in 1999. (T. 655.) In that position, he supervised between 300 and 500 employees of the State of Illinois. (T. 654.) One of Turner's responsibilities as the Director of the Division of Physical Services was the maintenance of State owned or occupied buildings, including the buildings in which Dinora, Medvesek and Boyce performed their janitorial duties – the Herndon Building and the Court of Claims building in Springfield, Illinois. (T. 15.) Turner also oversaw engineers, construction workers, maintenance workers and others. (T. 653-54.)

Turner was not a direct supervisor of Dinora, Medvesek or Boyce. (T. 14.) There were three levels of supervision between Turner and the janitors. (T. 14.) The organizational structure of the Division of Physical Services placed the director, Turner, at the top. (T. 14.) Reporting to him was a deputy director, to whom division chiefs reported. (T. 14.) The 75 janitors employed by the Division of Public Services reported to building managers, who were one step below the division chiefs. (T. 14.)

Pursuant to the Illinois Secretary of State Policy Manual, all employees of the Illinois Secretary of State were required to report violations of employment duties directly to the Executive Inspector General. (T. 20.)

B. The Job Responsibilities of Dinora, Medvesek and Boyce

Dinora, Medvesek and Boyce were responsible for providing janitorial services at the Herndon Building and the Court of Claims building. (T. 470.) Dinora worked as a janitor for the Secretary of State from 1987 to 2005. (T. 218.) Turner promoted Dinora to lead night janitor after Turner was appointed Director in 1999. (T. 247.) Medvesek worked as a janitor for the Secretary of State from 1985 to 2005. (T. 466.) Boyce worked as a janitor for the Secretary of State from 1984 to 2005. (T. 412.)

Their hours of employment were between 3:00 p.m. and 11:00 p.m., Monday through Friday. (T. 219-220.) For any period of time they were not at work during those hours (other than for state holidays and allowed breaks, including a dinner break), they were required to submit and have approved leave requests. (T. 416.)

From 1995 until March 31, 2004, Dinora also was employed as an assistant superintendent for the City of Springfield Public Works Department. (T. 220-221.) In that position, Dinora directed Public Works employees to perform various tasks, including collection of trash and other items that blocked a through-way or otherwise created a public hazard in Springfield. (T. 232-33.)

C. The Janitors' Scheme

The purpose of the janitors' scheme was to work less than they were required to without applying for and receiving approved leave. The charged scheme was from April of 1999 until August of 2005. (R. 67, Pet. App. 27A.) The Division of Physical Services' procedure was that employees were to turn in leave requests saying they were sick or needed to take leave of their duties for some other personal reason. (T. 416.) Employees could turn in requests for leave on the same day they were taking leave. (T. 416.) Dinora, Medvesek and Boyce regularly took unauthorized leaves from work without submitting leave requests. (T. 249.)

The three janitors took steps to conceal their unauthorized absences so that they did not use up the time the State had allotted them for approved leave. When one of the three was at work and was asked by someone where another janitor was, the janitor at work would telephone the absent janitor so that he could come into work or call the person who had inquired about him. (T. 251.) When Medvesek or Boyce left work before their shift was over, whichever of the two stayed later would leave a note addressed to their supervisor in the Herndon Building. (T. 260.) The note said that Dinora had gone to the Court of Claims building and their supervisor should page him. (T. 260.) The note ensured that if a supervisor checked on the janitors, the supervisor would page Dinora who could then arrange for the janitors to go to the

Court of Claims building or otherwise cover their absence.

Beginning in approximately January 2004 and continuing until the end of the scheme, Medvesek and Boyce alternated days on which one left early without filling out leave requests. (T. 470.) On most days, one of them left work before 5:00 p.m., and the other usually left before 10:00 p.m. (T. 470.) During this period, Dinora was almost never at work. (T. 417.)

Beginning in the Spring of 2005 and continuing until August, 2005, Medvesek and Boyce filled out leave slips before one left for the night. (T. 261-62.) The leave slip would correctly reflect that the janitor who was absent had taken leave. (T. 261-62.) If no one checked on the janitors that night, the janitor who stayed at work would tear up the other's leave slip. (T. 262.) The janitors also created two sets of attendance logs, one correctly stating that the other two had not worked their full shift. (T. 424-25.) If no one checked on the janitors, the janitors would submit a false attendance log reporting that each janitor had worked all the hours of his shift. (T. 274-75.)

The janitors submitted the false attendance logs to the division attendance clerk. An attendance clerk for each of the divisions of the Division of Physical Services reviewed the attendance logs. (T. 529-31.) If the attendance clerk did not notify the payroll manager that an employee

was missing work and should be docked pay, the employee would receive his full salary. (T. 531.)

D. Turner's Role in the Janitors' Scheme

The Government charged that Turner hindered the supervisors of Dinora, Medvesek and Boyce from investigating the amount of time the janitors were spending at work and disciplining the three. (R. 67, Pet. App. 34A-35A.) In April of 1999, Turner relieved one of the janitors' supervisors of his supervisory duties over Dinora, Medvesek and Boyce. (T. 173.) This occurred after the supervisor had reported that the janitors were not working as they should have been. (T. 172.) On several other occasions, Turner told supervisors to leave the janitors alone and only check on the Herndon Building if there were complaints about it not being clean. (T. 26, 32-33, 46.) Turner disclosed to Dinora the existence of an investigation by the Secretary of State Inspector General's office into the janitors' absences from work. (T. 335.) Turner also told Dinora on several occasions that Dinora had nothing to worry about and that Turner "had his back." (T. 268, Ex. 4.)

E. Turner Received No Benefit for Any Participation in the Janitors' Scheme

The Government charged that in exchange for hindering the investigation, Dinora directed the Springfield Public Works Department to give Turner preferential treatment when Turner requested that the Department pick up trash or

other items in Turner's neighborhood. (R. 67, Pet. App. 29A.) However, the evidence at trial was that Turner, as a result of his and his wife's positions in the community, received preferential treatment from the Department regardless of Turner's relationship with Dinora. (T. 373, 402.) On appeal, the government conceded that Turner received no private gain from the janitors' scheme. *See Turner*, 555 F.3d at 655, Pet. App. 15A-16A.

F. The Government's Charges Against Turner and the Use of Wire Communications

The Government charged Turner with four counts of wire fraud under 18 U.S.C. §§ 1343 and 1346. To convict under either statute, proof of three elements is required: (1) the defendant participated in a scheme to defraud; (2) the defendant intended to defraud; and (3) a use of an interstate wire in furtherance of the fraudulent scheme. *United States v. Radziszewski*, 474 F.3d 480, 484-85 (7th Cir. 2007). The government advanced two theories against Turner under the wire fraud statutes. First, the government alleged that Turner aided and abetted the janitors' scheme. Second, the government alleged that Turner deprived the State of Illinois of his honest services.

The basis for charging Turner under the wire fraud statutes was that Dinora and Boyce received their paychecks from the State of Illinois by direct deposit. (R. 67, Pet. App. 42A.) Neither Medvesek nor Turner were paid by direct deposit. (T. 523;

R. 67, Pet. App. 42A.) Neither the hiring of the janitors nor the subscription by the janitors to the state's direct deposit service was temporally linked by the Government to the scheme. The evidence at trial was that at least one of the janitors received his paycheck by direct deposit before the charged scheme began and that the janitors worked for the Department of Physical Services for over a decade before the scheme began. (T. 218, 219, 412, 466.)

II. Appellate Jurisdiction

This case and Defendant-Appellant Cecil Turner were before the United States District Court for the Central District of Illinois pursuant to 18 U.S.C. § 3231 on charges of violation of 18 U.S.C. §§ 1343, 1346 and 2, wire fraud, and 18 U.S.C. § 1001, making false statements. Appellate jurisdiction was conferred pursuant to 28 U.S.C. § 1291 because the judgment of the District Court was final. Sentence was imposed on January 4, 2007 and Judgment of Conviction was entered on January 9, 2007. Notice of Appeal was entered on January 9, 2007.

III. Court of Appeals Decision

The court of appeals affirmed Turner's conviction under 18 U.S.C. §§ 1343 and 1001. *Turner*, 551 F.3d at 668-69, Pet. App. 24A. The court held that "[t]he janitors' inflated wages – full-time pay for part-time work – were at the heart of this money or property fraud, and two of the three were

paid by direct deposit." *Id.* at 667, Pet. App. 21A. Thus, the court held that the direct deposits were in furtherance of the scheme because they "were the main object of the fraudulent scheme, the final step in the completion of the plot." *Id.*

As to the deprivation of honest services charge, the court cited its recent holding in *United States v. Sorich*, 523 F.3d 702, 707-08 (7th Cir. 2008) in finding that the lack of evidence of private gain to Turner was not fatal to the 18 U.S.C. § 1346 charge. *See Turner,* 551 F.3d at 665, Pet. App. 16A-17A. The court did not directly consider whether the payment of the janitors by direct deposit was enough to meet the furtherance requirement of the honest services charge under 18 U.S.C. § 1346, although the decision suggests that it was not. *See id.* at 667-68, Pet. App. 22A. However, the court found the honest services charge unnecessary. The court held that the evidence was sufficient to convict Turner "for aiding and abetting conventional money or property fraud" and affirmed his conviction on that basis. *Id.* at 666, Pet. App. 18A.

REASONS FOR GRANTING THE WRIT

The Court should grant the writ to answer important questions regarding the scope of 18 U.S.C. § 1343 and the appropriate test for courts to apply in determining whether the use of the wires actually is in furtherance of the charged scheme. The application of the federal wire fraud statutes to the conduct at issue here unnecessarily

and uncontrollably expands the reach of 18 U.S.C. § 1343. The court of appeals reasoned that the federal wire fraud statutes applied because the janitors' salaries were property, the purpose of the janitors' scheme was to work less and get paid and therefore the direct deposits were in furtherance of the scheme. *Turner*, 551 F.3d at 667, Pet. App. 21A. Under that reasoning, any shirking of a job responsibility would be wire fraud if the shirking employee were paid by direct deposit.

The wire fraud statute requires that wire communications be employed "for the purpose of executing [the charged] scheme or artifice." 18 U.S.C. § 1343. This Court's precedent recognizes that not all mailings or wire transmissions associated with a charged scheme are sufficiently "for the purpose of" or "in furtherance of" the scheme to support a charge. *See Kann v. United States*, 323 U.S. 88, 95, 65 S. Ct. 148, 151, 89 L. Ed. 88 (1944). In *Kann*, the Court held that the mailing of fraudulently cashed checks between two banks was not in furtherance of the charged scheme because the fraud was complete when defendants obtained cash from the first bank. *Id.* The *Kann* Court held that "[t]he federal mail fraud statute does not purport to reach all frauds, but only those limited instances in which the use of the mails is part of the execution of the fraud, leaving all other cases to be dealt with by appropriate state law." *Id.*

Following *Kann*, the Court held in *United States v. Maze* and *Parr v. United States*, that

subsequent mailings of invoices of unauthorized credit card charges did not meet the furtherance element of mail fraud. *United States v. Maze*, 414 U.S. 395, 402, 94 S. Ct. 645, 649, 38 L. Ed. 2d 603 (1974); *Parr v. United States*, 363 U.S. 370, 393, 80 S. Ct. 1171, 1184, 4 L. Ed. 2d 1277 (1960). In both cases, the Court held that the furtherance element was not met because the scheme was complete when the defendants received the goods and services from their fraudulent use of the credit cards. *Maze*, 414 U.S. at 402, 94 S. Ct. at 649; *Parr*, 363 U.S. at 393, 80 S. Ct. at 1184. In *Maze*, the Court noted that "Congress could have drafted the mail fraud statute so as to require only that the mails be in fact used as a result of the fraudulent scheme. But it did not do this. . ." *Maze*, 414 U.S. at 405, 94 S. Ct. at 651.

In *Parr*, the Court also considered a second fraudulent scheme relating to the misappropriation of tax revenue. *Parr*, 363 U.S. at 390, 80 S. Ct. at 1183. The Government charged that scheme as mail fraud because tax statements, checks and receipts were mailed. *Id.* The Court held that the furtherance element was not met because the mailings were "made under the imperative command of duty imposed by state law." *Id.* at 391, 80 S. Ct. at 1184.

Following these cases, the Seventh Circuit, in *United States v. Kwiat*, 817 F.2d 440, 443 (7th Cir. 1987), overturned the convictions of two co-schemers under 18 U.S.C. § 1341 because the

mailings were not sufficiently connected to the charged scheme. *See Kwiat* at 443.

The mail fraud convictions in *Kwiat* were based on a scheme by bank directors to defraud the bank's depositors and stockholders of the directors' honest services. *See id.* The scheme involved recklessly approving loans on overvalued condominiums resulting in a loss of $600,000.00 to the bank, while the co-schemers received $15,000.00 in commissions for each condominium unit financed by the bank. *Id.* at 442. The mailings were of mortgage instruments. *Id.* at 443. After lending the money, the bank had each mortgage recorded. *See id.* Then, the recorder of deeds mailed the mortgage instrument back to the bank. *Id.*

In determining that the mailings of the mortgage documents did not further the scheme, the *Kwiat* court considered that "honest services would have produced the same sort of mailings." *Id.* at 443-44. The court also considered that applying the mail fraud statute in *Kwiat* would unnecessarily broaden the mail fraud statute. *Id.* at 444. The court held:

> If this "scheme" in conjunction with this sort of mailing is mail fraud, then any corporate officer's breach of fiduciary duties is mail fraud, for every corporation uses the mails in some way or another . . . Unless all flouting of corporate duties is mail fraud, this scheme is not criminal under § 1341.

Id.

In *Turner,* the court of appeals distinguished its holding in *Kwiat* on two grounds. *Turner*, 551 at 667, Pet. App. 20A-21A. First, the court noted that *Kwiat* was submitted to the jury only as an honest services fraud case. *Id.* Second, the court concluded that the mortgage mailings at issue in *Kwiat* were not as directly related to the scheme as the janitors' paychecks were here. *Id.*

The court's reasoning in distinguishing *Kwiat* from this case is problematic because it expands wire fraud jurisdiction to common workplace misconduct. Given the court's conclusion that the failure to fully perform job duties can be prosecuted both as honest services fraud and property fraud, the court's distinction between 18 U.S.C. § 1343 and 18 U.S.C. § 1346 makes little difference. Even more problematic is the court's reasoning that paycheck deposits were the main object of the janitors' scheme. Because almost everyone works for pay, this logic creates a basis to charge almost any failure to perform job duties as wire fraud.

The standard applied to the furtherance requirement seemingly changed with this Court's holding in *Schmuck*. Distinguishing, but not overruling, the *Kann-Parr-Maze* line of cases, the Court held that mailings that are only incidental or tangential to the underlying fraud can support a mail fraud prosecution, even if the mailings themselves are "innocent." *See Schmuck* 489 U.S. at 711, 109 S. Ct. 1443.

The mailings at issue in *Schmuck* were title applications mailed by car dealers who bought cars with fraudulent odometer readings from the defendant. *Id.* Citing *Parr*, the *Schmuck* Court held that even though the title applications were innocent mailings in that they did not contain any false information, innocent wire communications may bring conduct under the wire fraud statutes. *Id.* at 489 U.S. at 714-15, 109 S. Ct. at 1450. The *Parr* Court had found that innocent mailings can meet the furtherance requirement only if they are a "step in the plot." *Parr*, 363 U.S. at 390, 80 S. Ct. at 1183 (citations omitted).

In *Schmuck*, the defendant was a used car dealer who bought cars, rolled back their odometers and sold them to other dealers at a higher price. *Id.* After Schmuck sold the cars, the dealers sold them to innocent purchasers and mailed title applications to state motor vehicle agencies. *Id.* The Court held that the mailings met the furtherance requirement because Schmuck's scheme depended on continued good relationships with the dealers. *Id.* at 711-12, 109 S. Ct. at 1449. Thus, the mailings were "incidental to an essential part of the scheme" because without the transfer of title, the dealers would not have continued to purchase cars from Schmuck. *Id.*

The *Schmuck* Court distinguished the Court's previous holdings in the *Kann-Parr-Maze* line of cases by characterizing the mailings in the three earlier cases as "little more than post-fraud accounting among the potential victims of various

schemes." *Id.* at 714, 109 S. Ct. at 1449. The *Schmuck* Court further distinguished *Parr* by noting that although both the title registration mailings in *Schmuck* and tax mailings in *Parr* were required by law, the *Parr* mailings would have taken place "regardless of the defendant's fraudulent scheme," as contrasted with *Schmuck*, where the mailings were "derivative of Schmuck's scheme to sell 'doctored' cars and would not have occurred but for that scheme." *Id.* at 713, n. 7, 109 S. Ct. at 1449.

Since the Court's holding in *Schmuck*, circuit courts have taken differing approaches to determining whether mailings or wire transmissions are sufficiently connected to a charged scheme. In *United States v. Strong*, 371 F.3d 225 (5th Cir. 2004), the Fifth Circuit analyzed whether the mailings of fraudulently obtained certificates of original titles of cars met the mailing requirement of 18 U.S.C. § 1341. 371 F.3d at 230. At issue in *Strong* was a scheme under which Strong and his brother bid on used cars at auctions and obtained immediate physical possession of the vehicles. The brothers never honored their bids, but obtained certified copies of original titles after presenting fraudulent title applications. The brothers then sold the vehicles with the certified copies of the original titles to unsuspecting third parties. *Id.* at 226-27.

The scheme was charged under 18 U.S.C. § 1341 because the false title applications were mailed from one department of transportation

branch to another. *Id.* at 226-27. Strong argued that the mailings were not used to execute the scheme because "the mailings occurred after the fraud was complete; once the [certified copy of original title] was obtained, the subsequent mailing . . . was a mere formality and totally immaterial to the success of the Strong's fraudulent scheme." *Id.* at 229.

The Fifth Circuit agreed. Based on *Schmuck,* the court found that "[t]he question, then, is whether the mailings themselves somehow contributed to the successful continuation of the scheme – and if so, whether they were so intended by Strong." *Strong*, 371 F.3d at 230 (*citing Schmuck*, 389 U.S. at 711-12, 109 S. Ct. 1443).

The court of appeals' decision here conflicts with the analysis in *Strong* and creates further questions regarding the furtherance requirement under 18 U.S.C. § 1343. As in *Strong*, the fraud here was complete once the janitors submitted their false attendance sheets to their division, and the fact that two janitors were paid by direct deposits in no way contributed to the scheme. The Seventh Circuit's holding also conflicts with its earlier holding in *Kwiat* and this Court's precedent in *Schmuck* because the direct deposits did not come about because of the scheme. Moreover, concluding that a scheme to avoid job responsibilities is furthered by the direct deposit of a paycheck stretches the reach of 18 U.S.C. § 1343 and makes the federal government the enforcer of workplace conduct.

CONCLUSION

For the foregoing reasons, the Court should grant writ of certiorari to clarify the standard for determining whether a direct deposit is sufficiently related to a charged scheme.

Respectfully submitted,

Michael J. Gonring
Counsel of Record
QUARLES & BRADY LLP
411 E. Wisconsin Ave.
Milwaukee, WI 53202-4497
(414) 277-5000
Attorney for Petitioner

Dated: April 22, 2009.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 07-1062

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

CECIL TURNER,
Defendant-Appellant.

Appeal from the United States District Court
for the Central District of Illinois.
No. 06 CR 30012 – **Joe Billy McDade**, *Judge.*

ARGUED DECEMBER 3, 2007 – DECIDED
DECEMBER 30, 2008

Before BAUER, EVANS, and SYKES, *Circuit Judges.*

SYKES, *Circuit Judge.* A jury convicted Cecil Turner of two counts of making false statements to the FBI and four counts of wire fraud for his part in a fraudulent scheme by which three janitors employed by the State of Illinois worked only a small fraction of their required 40 hours per week but falsified their attendance logs and

collected their full salaries. On appeal, Turner contends that his statements to the FBI were not material because the FBI already knew about his involvement in the scheme and therefore could not have been misled by what he said. We disagree. A false statement need not actually influence the agents to whom it is made in order to satisfy the materiality requirement for this offense; it need only have the possibility of influencing a reasonable agent under normal circumstances. Turner's statements to the FBI – denying that he provided supervisory cover for the janitors' fraudulent scheme – satisfied this standard.

Turner also maintains the evidence was insufficient to convict him of wire fraud. His argument is twofold: He challenges the sufficiency of the evidence on the government's "honest services" fraud theory and the sufficiency of the use of the wires. As to the former, the case was charged and submitted to the jury as a traditional money or property fraud and as an honest services fraud. The evidence established that Turner aided and abetted a straightforward money or property fraud – Turner assisted the janitors' fraudulent scheme to collect thousands of dollars in wages for hours they did not work – so the verdict may be sustained regardless of any factual insufficiency on the alternative honest services fraud theory. As for the use of the wires, two of the janitors were paid through direct deposit; under the circumstances of this case, this use of the wires was sufficient to satisfy the wire-fraud statute. The janitors' receipt of falsely

inflated wages was the final step – indeed, it was the whole point – of the fraudulent scheme.

I. Background

Turner was the Director of the Division of Physical Services for the Illinois Secretary of State's office from 1999 to 2005. He supervised over 300 employees who were responsible for cleaning and maintaining various state- owned buildings in Springfield, Illinois. Three of those employees were night janitors Dana Dinora, Steven Boyce, and David Medvesek. Turner promoted Dinora to lead night janitor shortly after being appointed Director in 1999, and the three janitors comprised a cleaning crew responsible for the Herndon Building, the Court of Claims, and the Lincoln Towers. Dinora also worked as an Assistant Superintendent for the City of Springfield Public Works Department where he handled street cleaning and garbage pick-up throughout the city.

Dinora and his crew were required to report to work by 3 p.m. Monday through Friday and stay until 11 p.m. As with any other employee, each was required to submit a leave slip and obtain approval if he was going to be absent during normal work hours. The janitors were supervised by building managers, who in turn reported to the division chief, who was overseen by the deputy director, who reported directly to Turner.

Led by Dinora, the three night janitors devised a scheme to take massive amounts of

unauthorized leave without being detected by their supervisors. At its peak the scheme allowed Dinora to collect a full salary while working less than 30 minutes each day and the others to receive full pay while cutting their work hours in half. Sometimes one janitor would remain at work while the other two were absent; the "on duty" janitor would tip off the absent ones if questioned by a supervisor about the whereabouts of the other members of the crew. The absent janitors would then come in to work, call the supervisor who made the inquiry, or submit an appropriate leave slip. Another feature of the scheme involved leaving a note in one building falsely representing that the absent janitor was working in another building. The three janitors also kept two sets of attendance logs. The first accurately recorded occasions when one or more of the janitors did not work a full shift and submitted a proper leave request. If no one checked their work that night, however, the "on-duty" janitor would replace the first, accurate attendance log with a second log falsely recording that all three had been working the entire night.

The janitors' scheme could not have succeeded without Turner's help. Prompted by requests from Dinora, Turner repeatedly intervened when the janitors' immediate supervisors began to watch the three more closely. In 1999 Building Manager Randy Lewis forced Dinora to prove that he was actually sick before taking more sick days. Dinora complained to Turner, who reprimanded Lewis and told him to leave Dinora and his crew alone. Two other building managers received similar

warnings after attempting to more closely supervise Dinora. Building Manager James Carter was admonished by Turner to "stay the hell away from" Dinora and his crew after Dinora told Turner that Carter was watching the Herndon Building. Turner also instructed Building Manager Harry Fanning to leave Dinora's men alone and to stop checking their work.

Turner's efforts to deflect attention from the night janitors' fraud were successful from 1999 until 2003, when Division Chief Dodie Stannard became involved. After receiving numerous complaints about the unsanitary conditions in the buildings that Dinora's crew was assigned to clean, Stannard began to investigate. On a number of occasions, she visited the Herndon Building at night and found no one there cleaning. Just to be sure the men weren't working in another of their assigned buildings, she checked the Court of Claims, but it, too, was deserted. She made a written report to Turner about her investigation and recommended involving the Inspector General. Turner responded harshly, claiming that Stannard had "stabbed him in the back" by putting her concerns in writing instead of passing along the information verbally. He also told her that reporting Dinora's crew to the Inspector General's office was unnecessary as the matter rested with him alone.

The fraud thus went undetected through mid-2005, when Stannard defied Turner and contacted the Inspector General's office. In August 2005

Turner's wife, Doris – a member of the County Board – called Dinora to warn him that Stannard had tipped off the Inspector General. Dinora confirmed this with Turner, who told Dinora to be careful and make sure his crew showed up for work. A week later, inspectors advised Turner of their investigation and told him not to disclose it to anyone. Nevertheless, Turner kept Dinora informed about the Inspector General's inquiry and advised him to watch his crew closely. In September the FBI opened an investigation and Dinora began cooperating. Thereafter Dinora recorded many of his conversations with Turner.

As a result of Dinora's cooperation, Turner became the focus of the investigation. In mid-October FBI agents questioned Turner about the janitors' scheme. He told them that he never "looked the other way" for Dinora or his crew and that he never reprimanded any of their supervisors for checking on their activities at the Herndon Building. He also claimed that he only learned about the scheme in September 2005 and that he complied with the Inspector General's request to tell no one about the investigation. The FBI interviewed him again in November, and Turner stuck to his story. When asked if he told his wife to call Dinora, Turner denied it. The agents then played a tape of Doris Turner warning Dinora about the Inspector General's investigation and explaining that she was calling on behalf of her husband. Turner continued to maintain that he did not ask his wife to make the call.

Turner was charged with four counts of wire fraud in violation of 18 U.S.C. §§ 1343 and 1346 and two counts of making false statements in violation of 18 U.S.C. § 1001.[1] The government's wire-fraud theory was that Turner either aided and abetted the night janitors' fraudulent scheme or deprived the State of Illinois of his honest services.

At the close of the government's case, Turner moved for judgment of acquittal on the wire-fraud charges under Rule 29(a) of the *Federal Rules of Criminal Procedure*, arguing insufficiency of the evidence. The district court denied this motion. The court also denied Turner's later motion under Rule 29(c) for judgment of acquittal after the jury returned a verdict of guilty on all charges. Turner appeals, reiterating his challenges to the sufficiency of the evidence in a number of respects.

II. Analysis

A. False Statements to the FBI

Turner contends the evidence was insufficient to convict him of making false statements in violation of 18 U.S.C. § 1001.[2] On these counts the

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[1] Dinora, Boyce, and Medvesek were charged with four counts of wire fraud and all three pleaded guilty.

[2] The statute provides: "Except as otherwise provided in this section, whoever, in any matter within

government was required to prove that Turner's statements were false; material; knowingly and willfully made; and concerned a matter within the jurisdiction of a federal department or agency – here, the FBI. *United States v. Ringer*, 300 F.3d 788, 791 (7th Cir. 2002). Turner claims there was not enough evidence to prove that the FBI investigation was within its jurisdiction or that his false statements were material.

On a sufficiency-of-the-evidence challenge, we view the evidence in the light most favorable to the verdict and will overturn the conviction only if there is no evidence upon which a rational juror could have found the defendant guilty. *United States v. James*, 464 F.3d 699, 705 (7th Cir. 2006). Adding to this already steep burden is the fact that Turner did not move for acquittal on the charges of making false statements; his Rule 29 motions were directed at the wire-fraud counts. FED. R. CRIM. P. 29(c). Accordingly, he must establish a "manifest miscarriage of justice." *United States v. Banks*, 405 F.3d 559, 569 (7th Cir. 2005). "Manifest miscarriage of justice is perhaps the most demanding standard of appellate review. We will reverse 'only if the

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the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully . . . (2) makes any materially false, fictitious, or fraudulent statement or representation" shall be subject to a fine and imprisonment of up to five years. 18 U.S.C. § 1001(a)(2).

record is devoid of evidence pointing to guilt, or if the evidence on a key element of the offense was so tenuous that a conviction would be shocking.'" *United States v. Taylor*, 226 F.3d 593, 597-98 (7th Cir. 2000) (quoting *United States v. McKinney*, 143 F.3d 325, 330 (7th Cir. 1998) (internal quotation marks omitted)).

Turner's first argument – that the investigation was within the jurisdiction of the State of Illinois, not the FBI – may be dispatched quickly. In *United States v. Rodgers*, the Supreme Court cautioned that the term "jurisdiction" in § 1001 is not given a "narrow or technical meaning." 466 U.S. 475, 480 (1984). Rather, "the phrase 'within the jurisdiction' merely differentiates the official, authorized functions of an agency or department from matters peripheral to the business of that body." *Id.* at 479. The Court concluded in *Rodgers* that "[t]here is no doubt" that the FBI "is authorized 'to detect and prosecute crimes against the United States,'" including, in that case, kidnaping. *Id.* at 481 (quoting 28 U.S.C. § 533(1)).

Here, Turner's statements to the FBI were made during the course of a criminal investigation into possible federal wire-fraud offenses, which falls squarely within the official, authorized functions of the FBI. *See United States v. F.J. Vollmer & Co., Inc.*, 1 F.3d 1511, 1518 (7th Cir. 1993) (finding that the question of jurisdiction is one of law "and a department or agency has jurisdiction only when it has the power to exercise authority in a particular situation"). That the

investigation originated with the State of Illinois is irrelevant.

Turner also argues that the statements he made to the special agents were not material because the agents already knew the answers to the questions before they asked him. The FBI was in possession of tape-recorded conversations between Dinora and both Cecil and Doris Turner at the time agents interviewed Turner. During the course of one of the recorded conversations, Doris, on behalf of her husband, warned Dinora about the Inspector General's investigation and told him to be careful about missing work. During a call a few days later, Turner reminded Dinora about the Inspector General's involvement and told him to make sure his crew filled out their leave slips. Turner argues that his statements cannot have been material to the FBI's investigation because the agents had these and other conversations on tape and therefore could not have been misled.

To be material for purposes of § 1001, a statement "must have 'a natural tendency to influence, or [be] capable of influencing, the decision of the decisionmaking body to which it was addressed.'" *United States v. Gaudin*, 515 U.S. 506, 509 (1995) (alteration in original) (quoting *Kungys v. United States*, 485 U.S. 759, 770 (1988)); *see also Kungys*, 485 U.S. at 771 (The "central object" of the materiality inquiry is "whether the misrepresentation or concealment was predictably capable of affecting, *i.e.*, had a natural tendency to affect, the official decision."). We have held, however, that "[u]nder section 1001

a false statement may be material even though the agency did not rely on it and was not influenced by it." *United States v. Dick*, 744 F.2d 546, 553 (7th Cir. 1984).

Similarly, we held in *United States v. Ranum*, that "it is not necessary for an allegedly false statement to have any ill effect at all, as long as it is capable of having such an effect." 96 F.3d 1020, 1028 n.12 (7th Cir. 1996). Other circuits are in accord. *See, e.g., United States v. White*, 270 F.3d 356, 365 (6th Cir. 2001) ("If the false statements are received by an agency, they may be material even if the receiving agent or agency knows that they are false."); *United States v. Sarihifard*, 155 F.3d 301, 306 (4th Cir. 1998) ("It is irrelevant whether the false statement actually influenced or affected the decision-making process of the agency or fact finding body."); *United States v. Service Deli, Inc.*, 151 F.3d 938, 941 (9th Cir. 1998) ("[T]he test is the intrinsic capabilities of the false statement itself, rather than the possibility of the actual attainment of its end as measured by collateral circumstances.") (internal quotation marks & citation omitted); *United States v. Edgar*, 82 F.3d 499, 510 (1st Cir. 1996) ("[T]he standard is not whether there was actual influence, but whether it would have a tendency to influence."); *cf. United States v. Baker*, 200 F.3d 558, 561 (8th Cir. 2000) ("Materiality does not require proof that the government actually relied on the statement."); *United States v. Neder*, 197 F.3d 1122, 1128 (11th Cir. 1999) ("[A] false statement can be material even if the decision maker did not actually rely on the statement.").

In *United States v. McBane*, 433 F.3d 344 (3d Cir. 2005), the Third Circuit rejected a materiality challenge quite similar to the one Turner advances here. The defendant was a local sheriff who confiscated a rifle from a suspect and later sold it to an FBI informant. When questioned by the FBI about the rifle, the defendant lied and told the agent that it remained in the possession of the sheriff's department at all times. *Id.* at 347. The Third Circuit posed the question presented as follows: "whether the test for 'materiality' necessarily requires that a false statement be capable of influencing an actual, particular decision of the agency at issue, or whether the test requires only that a statement be of a type that would naturally tend to influence a reasonable decisionmaking agency in the abstract." *Id.* at 350. Citing the materiality standard we have quoted above, the court concluded that a statement's "natural tendency to influence" suggests not that it must actually influence the agency but instead puts the focus more broadly on the "qualities of the statement in question that transcend the immediate circumstances in which it is offered and inhere in the statement itself." *Id.* at 351. The court held that the defendant sheriff's statements to the FBI were material – even though the FBI already had the information from its informant – because the sheriff's "misrepresentations, under normal circumstances, could cause FBI agents to re-direct their investigation to another suspect, question their informant differently or more fully, or perhaps close the investigation altogether." *Id.* at 352.

Here, as in *McBane*, Turner's statements to the FBI probably had very little actual influence on the agents because they were already in possession of incriminating recorded conversations between Turner, his wife, and Dinora. The agents were not likely swayed by Turner's false statements because he was on tape saying precisely the opposite to Dinora. But the point of his telling the agents that he did not learn of the trouble in the Herndon Building in September 2005 was to cast suspicion away from him, which in the ordinary course would have an intrinsic capability – a "natural tendency" – to influence an FBI investigation. The same is true of Turner's claim that he had not reprimanded any of his employees for monitoring Dinora's crew, as well as his later denial that he asked his wife to call Dinora on his behalf. Turner's statements were aimed at misdirecting the agents, and this is enough to satisfy the materiality requirement of § 1001.

B. Wire Fraud

The wire-fraud statute, 18 U.S.C. § 1343, makes it a crime to use the interstate wires in "any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises."[3] To

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[3] More fully, the wire-fraud statute, 18 U.S.C. § 1343 (2002), read: "Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises,

convict a defendant of wire fraud, the government must prove three elements: (1) the defendant participated in a scheme to defraud; (2) the defendant intended to defraud; and (3) a use of an interstate wire in furtherance of the fraudulent scheme. *United States v. Radziszewski*, 474 F.3d 480, 484-85 (7th Cir. 2007).

The government advanced two theories on the four counts of wire fraud against Turner: (1) that he aided and abetted the janitors' fraudulent scheme to obtain their full salaries while working only a fraction of their required hours; and (2) that he deprived the State of Illinois of its right to his honest services as Director of Physical Services. The latter theory derives from 18 U.S.C. § 1346, which provides that the term "scheme or artifice to defraud" in the mail- and wire-fraud statutes "includes a scheme or artifice to deprive another of the intangible right of honest services." Turner argues that the evidence was insufficient to establish an honest services fraud and that the use of the wires was not "in furtherance of" the fraudulent scheme.

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transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than 20 years, or both."

1. Honest Services Fraud

Turner argues that the evidence of an honest services fraud was insufficient because he received no private gain as a result of his participation in the janitors' fraudulent scheme. The "private gain" requirement is this circuit's gloss on the "honest services" variant of mail and wire fraud and is meant to limit the potential for overreach in prosecutions premised on § 1346. *See United States v. Sorich*, 523 F.3d 702, 707-08 (7th Cir. 2008); *United States v. Bloom*, 149 F.3d 649, 655 (7th Cir 1998). "Section 1346 was added to the Criminal Code in 1988 to equate a deprivation of honest services with deprivation of money or property" under the mail- and wire-fraud statutes. *United States v. Orsburn*, 525 F.3d 543, 546 (7th Cir. 2008). But "given the amorphous and open-ended nature of § 1346 . . . , courts have felt the need to find limiting principles, and ours has been that the '[m]isuse of office (more broadly, misuse of position) for private gain is the line that separates run-of-the-mill violations of state-law fiduciary duty . . . from federal crime.'" *Sorich*, 523 F.3d at 707 (quoting *Bloom*, 149 F.3d at 655) (alteration in original) (citation omitted).

There is no evidence that Turner received kickbacks or otherwise personally profited from the janitors' inflated salaries. There was evidence that Dinora – in his "day job" capacity as Assistant Superintendent in the Springfield Public Works Department – routinely arranged for expedited refuse removal at Turner's home. But the government did not suggest that this was

the "private gain" for purposes of its honest services fraud theory against Turner. Rather, in closing argument the prosecutor maintained that the private gain was the janitors' unearned salaries, not the preferential garbage collection. In its appellate brief, the government conceded that on this point its case had been flawed; it understood the private-gain requirement to mean that the defendant must have misused his office for *his own* private gain. But in *Sorich* – issued after this case was briefed and argued – we clarified that "[b]y 'private gain' we simply mean illegitimate gain, which usually will go to the defendant, but need not." 523 F.3d at 709.

We noted in *Sorich* that "in most honest services cases, the defendant violates a fiduciary duty in return for cash – kickbacks, bribes, or other payments," but explained that "[n]ot all [honest services] fraud cases follow this precise pattern." *Id.* at 707. The defendants in *Sorich* had misused their public offices for the private gain of third parties – campaign workers who were given civil-service jobs. This was sufficient, we said, because "the true purpose of the private gain requirement – and one that does not depend on who gets the spoils – is to prevent the conviction of individuals who have breached a fiduciary duty to an employer or the public, but have not done so for illegitimate gain." *Id.* at 710. We observed that although "someone up to no good will [usually] be out to enrich himself, not others . . . , '[a] participant in a scheme to defraud is guilty even if he is an altruist and all the benefits of the fraud accrue to other participants.'" *Id.* at 709 (quoting

United States v. Spano, 421 F.3d 599, 603 (7th Cir. 2005) (alteration in original)). Because the defendants in *Sorich* had "created an illegitimate, shadow hiring scheme based on patronage and cronyism by filling out sham interview forms, falsely certifying that politics had not entered into their hiring, and covering up their malfeasance," the "hallmarks" of an honest services fraud were present. *Id.* at 711.

Sorich thus makes the government's concession in this case unnecessary. But Turner's challenge to the sufficiency of the evidence of honest services fraud falls short for another reason. The government argued that because the evidence was sufficient to establish that Turner aided and abetted a straightforward money or property fraud, his wire-fraud convictions may be affirmed despite any factual infirmity in its honest services fraud case. We agree. It is well established that when a case is submitted to a jury on two correct theories of criminal liability, a general verdict is valid and will not be set aside as long as the evidence supporting one of the possible bases for conviction is sufficient. *Griffin v. United States*, 502 U.S. 46, 59-60 (1991); *United States v. Black*, 530 F.3d 596, 602 (7th Cir. 2008). Although reversal is generally required when on a general verdict only one of two bases for the conviction is legally sound, *see Yates v. United States*, 354 U.S. 298, 311-12 (1957), the same is not true when the issue is factual, not legal, insufficiency. When "two correct theories of illegality are presented in the instructions and there is sufficient evidence to convict only on one[,] the jury is assumed to have

followed the instruction on the government's burden of proof and therefore to have rejected the insufficiently supported theory." *Black*, 530 F.3d at 602.

Here, Turner claims there was insufficient evidence of *his own* private gain to support a conviction for honest services fraud. We have explained that the private gain need not be his own; the janitors' private gain is sufficient to support his conviction on an honest services fraud theory. But the honest services alternative was unnecessary to Turner's conviction in any event. The evidence was quite enough to convict him for aiding and abetting a conventional money or property fraud, and his conviction may be affirmed on this basis. He does not argue otherwise, except with respect to the "use of the wires" element, to which we now turn.

2. The Use of a Wire

The mail- and wire-fraud statutes are not intended to reach all frauds but only those in which a mailing or use of an interstate wire is part of the scheme. *Schmuck v. United States*, 489 U.S. 705, 710 (1989). The use of the mail or wire need not be an indispensable part of the fraud to satisfy the "in furtherance of" element of the offense; it need only "be incident to an essential part of the scheme . . . or a step in [the] plot." *Id.* at 710-11 (alteration in original) (internal quotation marks & citation omitted). "In other words, the success of the scheme must in some measure depend on the mailing [or wire

transmission]."[4] *United States v. Seward*, 272 F.3d 831, 836 (7th Cir. 2001). The defendant himself need not personally cause the mailing or use of the wire; it is enough that the use of mail or wire "will follow in the ordinary course of business, or where such use can reasonably be foreseen, even though not actually intended." *Pereira v. United States*, 347 U.S. 1, 8-9 (1954) ("Where one does an act with knowledge that the use of the mails will follow in the ordinary course of business, or where such use can reasonably be foreseen, even though not actually intended, then he 'causes' the mails to be used."); *United States v. Hickok*, 77 F.3d 992, 1004 (7th Cir. 1996). The mailing or use of the wires need not itself contain false or fraudulent material; a "routine or innocent" mailing or use of the wire can supply this element of the offense, as long as the use of the mail or wire is part of the execution of the scheme. *Schmuck*, 489 U.S. at 714-15; *United States v. Brocksmith*, 991 F.2d 1363, 1368 (7th Cir. 1993).

Here, the wire transmission was the direct deposit of Dinora's and Boyce's inflated paychecks. Turner argues that this use of the interstate wires was a regular part of the janitors' employment, unrelated to and therefore not "in furtherance of" their fraudulent scheme. For support he cites *United States v. Kwiat*, 817 F.2d 440 (7th Cir.

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[4] Cases construing the mail-fraud statute are equally applicable to cases involving violations of the wire-fraud statute. *United States v. Leahy*, 464 F.3d 773, 786 (7th Cir. 2006).

1987), but we think the case is distinguishable. The fraudulent scheme in *Kwiat* involved risky real-estate loans by bank directors who persuaded investors to purchase condominiums in which the directors had an interest. No credit checks on the investors or appraisals of the property were performed. When the loans eventually defaulted, the bank lost more than $600,000. The directors were charged with "honest services" mail fraud in violation of § 1341.[5] The alleged mailings in furtherance of the fraud occurred when the recorder of deeds mailed each mortgage instrument back to the bank after it had been recorded. We held that these mailings were not "in furtherance of" the fraudulent scheme because they "did not make the fraud possible or facilitate it. . . . The mailings are offshoots of the loans, but honest services would have produced the same sort of mailings." *Id.* at 443-44.

Kwiat is not analogous here, not least because it was submitted to the jury *solely* as an honest services fraud case. As we have explained, in this case the honest services theory was merely duplicative; the evidence easily established a

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[5] The indictment followed our decisions in *United States v. George*, 477 F.2d 508, 513 & n.6 (7th Cir. 1973), and *United States v. Dick*, 744 F2d 546, 550 (7th Cir. 1984), which adopted the "intangible rights" theory of mail fraud. The Supreme Court eliminated this theory in *McNally v. United States*, 483 U.S. 350, 360 (1987), and Congress restored it in 1988 with the passage of § 1346.

traditional money or property fraud, so whether the direct deposits were sufficiently incident to Turner's violation of his duty of honest services is beside the point. *See Orsburn*, 525 F.3d at 546 (noting that "[s]ection 1346 is a definitional clause, not a separate crime"). The janitors' inflated wages – full-time pay for part-time work – were at the heart of this money or property fraud, and two of the three were paid by direct deposit. While the after-the-fact mortgage mailings in *Kwiat* did not facilitate or perpetuate the directors' breach of their duty of honest services, the direct paycheck deposits at issue here were the main object of the fraudulent scheme, the final step in the completion of the plot.

In *Sorich*, we noted that "courts have found that salaries fraudulently obtained" are "money or property" for purposes of a traditional mail- or wire-fraud offense. 523 F.3d at 713 (citing *United States v. Doherty*, 867 F.2d 47, 56, 60 (1st Cir. 1989)). Extrapolating from this point, we held in *Sorich* that the civil-service jobs wrongfully awarded to campaign workers were "property" within the meaning of the mail-fraud statute. *Id.* If a salary fraudulently obtained is "money or property" for purposes of establishing a traditional mail or wire fraud, then the receipt of that fraudulently obtained salary by means of direct deposit completes the plot and is therefore "in furtherance of" the fraudulent scheme.

Turner argues that if the direct deposit of a paycheck can satisfy the use of the wires element

of wire fraud, then every employee who commits an act of malfeasance on the job and is paid by direct deposit will be guilty of wire fraud, and the reach of the statute will be unlimited. If the conduct at issue involved an honest services fraud alone – not a money or property fraud – we might share this concern. That is, if a fiduciary breach (or other act of employee dishonesty) plus a paycheck directly deposited (or mailed, for that matter) were enough for liability under § 1346's alternative definition of "scheme to defraud," then the federal mail- and wire-fraud statutes would potentially reach a vast array of fiduciary and employee misconduct otherwise governed only by state law.

In contrast, here, as we have noted, the evidence established not a deprivation of honest services only but a theft by fraud of money or property. The whole point of the janitors' scheme – the "money or property" object of their scheme to defraud – was to obtain falsely inflated salaries. Turner provided the supervisory cover for this money-for-nothing scheme. That some of the fraudulently obtained wages were paid by way of direct deposit supplies the "use of the wires" element necessary to make this a federal wire fraud.

Our decisions in *Brocksmith* and *Hickok* support this conclusion. The defendant in *Brocksmith* was an insurance agent who used his clients' premium checks to pay for his personal expenses. *United States v. Brocksmith*, 991 F.2d 1363 (7th Cir. 1993). He told his clients to mail

their checks – endorsed to him and not the insurance company – to his office. He delayed purchasing their actual policies and instead expropriated the funds for his own use or purchased a policy for a previous customer. He also mailed required medical forms to two customers and sent them postcards setting up meetings to buy more time to cover their premiums. *Id.* at 1364-65. We held that the mailing of the fraudulently obtained premium checks was not only "incidental" to the defendant's scheme, but "it was his scheme." *Id.* at 1367. The other mailings allayed customers' suspicions and covered up the defendant's fraudulent activity. "Use of the mails to lull victims into a false sense of security, we have held, violates the mail fraud statute, even if it occurs after the money has been fraudulently obtained." *Id.* at 1367-68 (citing *United States v. Chappell*, 698 F.2d 308, 311 (7th Cir. 1983), *cert. denied*, 461 U.S. 931 (1983)).

The defendant in *Hickok* submitted fraudulent sales reports to a cellular phone company, and the company mailed him commission checks based in part on those reports. *United States v. Hickok*, 77 F.3d 992 (7th Cir. 1996). We held that this use of the mails was "an essential part of Hickok's scheme to defraud" because "[i]n order to receive commission money which he had not earned and to which he was not entitled," he had submitted false sales reports to the cellular phone company, which in turn sent him commission checks through the mail. *Id.* at 1004. "Obviously, the use of the mails to send commission checks . . . followed in the ordinary course of business, or was

at least reasonably foreseeable by Hickok." *Id.* (internal quotation marks omitted).

In both *Brocksmith* and *Hickok*, the "money or property" proceeds of the defendants' fraudulent scheme were received through the mail; in *Brocksmith* it was misappropriated insurance premiums and in *Hickok* it was unearned commissions. Similarly here, the "money or property" proceeds of the janitors' scheme – their unearned salaries – were received via wire transmission. That the direct deposits were a routine part of their employment does not make the use of the wires insufficient; even "routine or innocent" mailings and wire transfers can form the basis of a mail- or wire-fraud conviction if they are part of the execution of the scheme. *Schmuck*, 489 U.S. at 714-15; *Brocksmith*, 991 F.2d at 1368.

Accordingly, for the foregoing reasons, we AFFIRM Turner's convictions for making false statements in violation of § 1001 and for wire fraud in violation of § 1343.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

January 28, 2009

Before

WILLIAM J. BAUER, *Circuit Judge*

TERENCE T. EVANS, *Circuit Judge*

DIANE S. SYKES, *Circuit Judge*

No. 07-1062

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*	Appeal from the United States District Court for the Central District of Illinois
v.	
CECIL TURNER, *Defendant-Appellant.*	No. 06 CR 30012
	Joe Billy McDade, *Judge*

ORDER

On consideration of the petition for rehearing and for rehearing en banc, no judge in active service has requested a vote on the petition for rehearing en banc and all of the judges on the original panel have voted to deny rehearing. It is

therefore ordered that the petition for rehearing and for rehearing en banc is DENIED.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS
SPRINGFIELD DIVISION

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	Criminal No. 06-30012
v.	)	Violation: 18 U.S.C. §§ 2, 1343, 1346 & 1001
DANA DINORA, DAVID MEDVESEK, STEVEN BOYCE, and CECIL TURNER,	)	
Defendants.	)	

AMENDED INDICTMENT

THE GRAND JURY CHARGES:

COUNTS ONE THROUGH FOUR
Wire Fraud
18 U.S.C. §§ 1343, 1346 and 2

A. Introductory Allegations

Overview

1. The defendants Dana Dinora, David Medvesek, Steven Boyce and Cecil Turner fraudulently deprived the State of Illinois of its

right to their honest services and defrauded it of more than $150,000, in that Dinora, Medvesek and Boyce falsely caused their employer to believe they were at work for thousands of hours when in fact they were not at work and Turner protected them from being caught or disciplined for their unauthorized absences.

The Defendants

2. Dana Dinora, David Medvesek and Steven Boyce were employed full time as night janitors for the Division of Physical Services of the Illinois Secretary of State's Office.

3. Cecil Turner was the Director of the Division of Physical Services for the Illinois Secretary of State.

4. Until March 31, 2004, Dinora also was employed full time as a supervisor for the City of Springfield Public Works Department. In that position Dinora could properly direct Public Works employees to perform various tasks including collection of trash and other items that blocked a through-way or otherwise created a public hazard in the City of Springfield. After Dinora left employment with the city he was still able to influence Public Works employees to use city equipment on city time to collect trash and perform other tasks. At no time was it proper for Dinora to direct city employees using city equipment on city time to perform personal favors, including trash collection, merely for the convenience or benefit of individuals. The proper

way for individual homeowners and others to dispose of their trash was to hire and pay a private entity to pick up and dispose of the trash.

5. Frequently during the period of the scheme, Turner contacted Dinora and asked him to direct City of Springfield Public Works Department employees to perform special favors for him in the form of work that the city employees were equipped to perform but were not supposed to perform solely for the benefit of individuals. The work that Turner requested and that city employees performed using city equipment on city time included, among other things: the expedited removal of leaves, tree limbs and other yard waste at or near Turner's and others' property; the removal and disposal of trash, including an old dog house, a broken water heater, a broken refrigerator, bags of trash following campaign events and other trash from Turner's property; and, following a political campaign, the removal and disposal of numerous campaign signs for a candidate Turner supported, including a large number of such signs that had been collected and returned to Turner's property by others.

The Defendant's Responsibilities

6. As the Director of Physical Services for the Illinois Secretary of State, Cecil Turner was responsible for, among other duties, the maintenance of certain State owned or occupied buildings, including the Herndon Building and the Court of Claims building in Springfield, Illinois. Such responsibility included ensuring that the supervisors of his co-defendants properly

supervised them by making sure that they were at work during their official duty hours, performed their job responsibilities while at work and properly used leave when they were not at work.

7. At least two levels of supervision existed between Turner's position and that of his co-defendants, the janitors.

8. Dana Dinora, David Medvesek and Steven Boyce were responsible each work day for providing janitorial services at state office buildings in Springfield, including the Herndon Building and the Court of Claims building.

9. Turner was not authorized to cause or allow the State of Illinois to pay any of its employees for duty hours they were not at work unless the employees were on approved leave.

10. Shortly after Cecil Turner became the Director of Physical Services for the Illinois Secretary of State, Turner promoted Dinora to the lead janitor position over the night janitorial crew at the buildings in which Dinora worked. As the lead janitor, Dinora assigned the janitors in his crew to the buildings where they would work and determined what tasks they would perform there.

Official Duty Hours

11. Dinora's, Medvesek's and Boyce's official duty hours were from 3:00 p.m. until 11:00 p.m. on Monday through Friday. For any period of time they were not at work during those official duty

hours (other than for state holidays and allowed breaks, including a dinner break), they were required to submit and have approved leave requests.

12. According to rules of the Illinois Secretary of State, Dinora, Medvesek and Boyce were not entitled to receive pay from the State of Illinois for duty hours they were not at work unless they were on leave.

B. The Scheme

13. Beginning in or about April 1999 and continuing until in or about the end of August 2005, at Springfield and elsewhere in the Central District of Illinois, the defendants

DANA DINORA,
DAVID MEDVESEK,
STEVEN BOYCE and
CECIL TURNER

knowingly and with the intent to defraud, devised, executed, and aided and abetted the execution of a scheme and artifice to deprive the State of Illinois of its intangible right to their honest services and to defraud and obtain money from the State of Illinois by means of false and fraudulent pretenses, promises and representations, which scheme and artifice is described below.

The Manner and Means of the Scheme

14. As part of the scheme, defendants Dana Dinora, David Medvesek and Steven Boyce

devised a system that enabled them to receive their full salaries despite working only a fraction of their official duty hours. As the scheme progressed, the amount of hours for which they were paid without working increased.

15. Beginning in approximately January 2004 and continuing until the end of the scheme, defendant Dana Dinora (a) rarely arrived at work at or near 3:00 p.m. as he was required to do, (b) normally did not arrive at work until after 10:00 p.m., (c) typically spent less than 30 minutes at work each day, and (d) virtually never worked his entire shift.

16. Beginning in approximately January 2004 and continuing until the end of the scheme, defendants David Medvesek and Steven Boyce, with the knowledge and approval of Dana Dinora, adopted a system that enabled them each to work minimal hours on alternating days and to leave early every day without taking leave. Under the system, one of them left work usually before 5:00 p.m., and the other left usually before 10:00 p.m. They arranged in advance who worked the longer period and who worked the shorter period and, in general, alternated the long and short days between them.

17. As a part of the scheme, defendants Dinora, Medvesek and Boyce developed the following ways to conceal their unauthorized absences from work without taking leave:

a. When a janitor who was at work was asked by someone where another member of the janitorial crew could be located, the janitor who was at work would say that the other janitor was working at another building. The janitor who was at work would then telephone the absent janitor so that he could come into work or call the person who had inquired about him.

b. When Medvesek or Boyce (whichever one stayed at work later) left work for the night, he would put a note in the janitors' area at the Herndon Building. The note falsely said that Dinora had gone to the Court of Claims building. When defendant Dinora arrived at work after 10:00 p.m. to close the Herndon Building, he would remove the note.

c. Beginning in the Spring of 2005 and continuing until August, 2005, Medvesek and Boyce, with the knowledge and approval of Dinora, created two sets of Daily Attendance sheets concerning their work status. One Daily Attendance sheet reported that each janitor had worked all the hours of his shift. The other Daily Attendance sheet reported that the janitor had used leave for the unauthorized time that he was absent during his work shift. If no one in a position of authority noticed or questioned a janitor's absence from work, that janitor submitted the Daily Attendance sheet that falsely reported that he had worked all of his official duty hours. If someone in a position of authority noticed or questioned a janitor's absence from work when he was supposed to be working, the

janitor would submit the Daily Attendance sheet showing that he had taken leave.

d. When Dinora's immediate supervisors questioned the amount of time that Dinora, Medvesek or Boyce were working, Dinora notified Cecil Turner so that Turner was aware and could prevent any potential disciplinary actions from being taken against the janitors.

18. Beginning in April of 1999 and continuing until the end of August 2005, Dinora, Medvesek and Boyce submitted paperwork reflecting the hours they falsely claimed to have worked, knowing that the false paperwork was used by the Office of the Illinois Secretary of State to determine the amount of their wages. They also caused the State of Illinois to provide salary payments to them by means of wire transfers of funds to be direct-deposited into their bank accounts. The wire transfer of funds for Dinora and Boyce traveled interstate.

Turner's Aiding and Abetting the Execution of the Scheme

19. Knowing that Dana Dinora and the other janitors on his crew were not working all the hours for which they were being paid, Cecil Turner aided and abetted his co-defendants' scheme by taking actions that hindered, impeded and prevented the supervisors of Dinora, Medvesek and Boyce from investigating the amount of time they actually were at work and from taking

disciplinary action against one or more of them for failing to work their entire shifts.

Acts in Furtherance of Aiding and Abetting the Scheme

20. Turner discouraged, hindered, impeded and prevented the supervisors of Dinora, Medvesek and Boyce from checking to see whether they were at work when they were supposed to be there and from complaining of their unauthorized absences, as follows:

a. In approximately April 1999, after a supervisor reported that Dinora and his crew were not working as they should have been, Turner caused that supervisor to be relieved of his duties.

b. In 2001, a second supervisor of Dinora became aware that Dinora and his crew were not working as they should have been, and the supervisor instructed Dinora that Dinora and his crew had to report to work and fulfill their job responsibilities. The next day Turner told the second supervisor to leave Dinora and his crew alone. In the summer of 2002, the second supervisor parked across the street from the Herndon Building and observed Dinora leave the building as if he were finished working between 6:30 p.m. and 7:00 p.m. Dinora saw the supervisor watching him. The next day, Turner called the second supervisor into his office and told the second supervisor not to check up on Dana Dinora again.

c. During January 2003, Cecil Turner called a third supervisor into his office and reprimanded the third supervisor for having reported that Dinora and his crew were not working as they should have been.

d. In January 2004, a fourth supervisor made a written report to Turner that documented the fourth supervisor's findings that the three janitors were not cleaning the buildings properly and were not at work at required times. Shortly after the report was submitted, Turner screamed at the fourth supervisor for making a written report and said that the action of the fourth supervisor had stabbed him in the back.

e. On August 9, 2005, the fourth supervisor tried to visit Dinora at the Herndon Building during Dinora's work hours but was unable to locate Dinora. After paging Dinora, he reported to the Herndon Building where he met the fourth supervisor, who relayed to Dinora complaints regarding the lack of cleanliness of the Building. Dinora telephoned Turner and told him that Dinora thought the supervisor was trying to catch him not working. During the conversation the following statements were made:

Dinora: . . . It's like she wanted to come over here and try to catch me I think.

Turner: Nah, nah . . . it ain't about that. She ain't looking to catch you doing [expletive removed]. She knows better than that.

Dinora: Okay. Well . . . .

Turner: She already [expletive removed] knows better than that.

. . .

Dana. She has to do what the [expletive removed] I tell her to do. She reports. . . .

. . .

Okay? The building managers come to me . . . .

. . .

They all [expletive removed] report to me. So, you ain't got [expletive removed] to worry about.

. . .

Hey man. Don't, don't let that [expletive removed] scare you, Dana. I done told you I got your back, man.

f. In the summer of 2005 Turner learned that the Illinois Secretary of State's Inspector General would be conducting an audit of all departments, including the Physical Services Department. After Turner learned this, he cautioned Dinora that Dinora and his crew should put in leave slips while the possibility of an Inspector General investigation existed.

g. On August 17, 2005, the fourth supervisor again told Turner that Dinora, Medvesek and Boyce were not at work when they were supposed to be working. Turner told the fourth supervisor to tell the janitors that they needed to be at work and if they were not there

they should put in a leave slip. Turner also discouraged the fourth supervisor from checking-up on the janitors by saying that the fourth supervisor should not "baby sit" the janitors.

h. Shortly after Turner's meeting with the fourth supervisor, on August 17, 2005 Turner caused another individual to warn Dinora that he and his crew needed to be at work because Secretary of State personnel could be checking up on them. During that conversation the following statements were made:

Individual: Cecil told, Cecil's at work, and he didn't want to talk to you at work. But, he wanted me to call you and tell you that [your supervisor] . . . said something to him about she knew that you guys were signing in and leaving . . . .

. . .

Dinora: Okay. You want me, you think I should call him at work, or . . .

Individual: No. No. No, I mean . . .no. Don't call him at work.

. . .

'Cause he don't wanna talk about it, you know, on the work phone.

Dinora: Okay. I'll pass it on to the boys.

Individual: Okay. Don't say I said . . .

. . .

Okay. But just, yeah, but just . . just don't say I said it, okay?

Dinora: Hey, uh, you want me to just say uh . . . just tell 'em to be careful?

Individual: Yeah. Just tell 'em to be careful with it.

21. In January 2005 when Dinora's supervisor saw him at a high school basketball game during his normal work hours, the supervisor contacted Turner. Turner falsely claimed that he had spoken to Dinora before the game and had approved Dinora's leave to attend the game.

22. In August 2005, the investigators from the Inspector General's Office for the Illinois Secretary of State met with Turner and informed him that Dinora, Medvesek and Boyce were being investigated for not being at work during their official duty hours. The Inspector General agents asked Turner not to tell the janitors of such investigation. Later, on September 9, 2005, Turner personally warned Dinora the Inspector General was investigating the janitors and that Dinora needed to make sure that he submitted leave slips if he was not at work. On that date the following statements were made:

Turner: . . . You just take it easy and just fill your slips out. Okay?

Dinora: Okay.

Turner: 'Cause that, that [expletive removed] [your supervisor] . . . and you don't say a [expletive removed] word about this. That [expletive removed] [your supervisor] called the IG on you guys.

Dinora: Oh really?

Turner: Yep, so they're watchin' your moves. Just wanted you to know it. But you didn't hear it from me.

Duty to Provide Honest Services

23. As state employees, Turner, Dinora, Medvesek and Boyce each owed the Secretary of State and the State of Illinois a duty to provide honest, loyal and faithful services free from deception, promotion of self interests, self dealing and fraud.

Failure of Janitors to Provide Honest Services

24. During the course of the scheme, the defendants Dana Dinora, David Medvesek, Steven Boyce and Cecil Turner deprived the State of Illinois of its intangible right to their honest services as follows:

a. The three janitors, Dinora, Medvesk and Boyce, failed to be at work for all of their official duty hours as required;

b. They assisted each other's unauthorized absences from work;

c. They developed and implemented methods to cover-up their unauthorized absences from work;

d. They failed to inform their employer of their own unauthorized absences and that of the other janitors;

e. Defendant Turner hindered, impeded and prevented the supervisors of Dinora, Medvesek and Boyce from doing their jobs to properly supervise and discipline his co-defendants;

f. Turner failed to take action to ensure that Dinora, Medvesek and Boyce were providing honest services to the Illinois Secretary of State and the State of Illinois when put on notice that they were not;

g. Turner took affirmative action to cover-up the unauthorized absence of Dinora from his work as a janitor;

h. Turner allowed the moneys of the Illinois Secretary of State and the State of Illinois to be paid to his co-defendants for work they did not perform and for which the Illinois Secretary of State and the State of Illinois received no benefit; and

i. Each of the defendants received a substantial amount of money for wages to which he was not entitled, as they were not providing honest services.

C. **Execution of the Scheme**

25. On or about the dates listed below for each count for the purposes of executing and attempting to execute the aforesaid scheme the defendants

DANA DINORA,
DAVID MEDVESEK, and
STEVEN BOYCE

knowingly caused the interstate wire transfer of funds identified in each count to be made, and the defendant

CECIL TURNER

knowingly aided and abetted the execution of his co-defendant's scheme and knowingly executed the scheme to defraud his employer of his honest services:

COUNT	DATE	PAYEE	AMOUNT	BANK
1.	10/26/2004	Dinora	$1,143.40	Bank One
2.	11/10/2004	Dinora	$1,153.40	Bank One
3.	12/23/2004	Dinora	$1,153.40	Bank One
4.	11/10/2004	Boyce	$1,026.31	Nat'l City

All in violation of Title 18 U.S.C. §§ 1343, 1346 & 2.

COUNT FIVE

MAKING FALSE STATEMENTS
18 U.S.C. § 1001

On or about October 13, 2005 at Springfield, Illinois, in the Central District of Illinois, the defendant

CECIL TURNER

knowingly and willfully made to agents of the Federal Bureau of Investigation the following materially false and fictitious statements and representations, with respect to a matter within the jurisdiction of the Federal Bureau of Investigation, namely an investigation related to whether night janitors employed by the Illinois Secretary of State's Office defrauded the State of Illinois by being paid, by means of interstate wire transfers, for hours they did not work:

a. Turner told the agents that the first time he learned there was a problem with the janitors at the Herndon Building was approximately one and one half months prior to October 13, 2005, when in fact supervisors had put him on notice about the janitors on a number of occasions prior to that date;

b. Turner told the agents that he had never reprimanded any supervisor for checking on the janitors at the Herndon Building, when in fact he had done so on at least one occasion; and

c. Tuner told the agents that he had complied with the request of the Inspector General investigators not to tell anyone of their investigation of the janitors at the Herndon Building, when in fact he personally had warned Dinora of the investigation by stating to Dinora on September 9, 2005, "[Your supervisor] called to IG guys on you guys. . . . Yep, so they're watching your moves. . . . But you didn't hear it from me."

All in violation of Title 18 U.S.C. § 1001.

COUNT SIX

MAKING FALSE STATEMENTS
18 U.S.C. § 1001

On or about November 17, 2005 at Springfield, Illinois, in the Central District of Illinois, the defendant

CECIL TURNER

knowingly and willfully made to agents of the Federal Bureau of Investigation the following materially false and fictitious statements and representations, with respect to a matter within the jurisdiction of the Federal Bureau of Investigation, namely an investigation related to whether night janitors employed by the Illinois Secretary of State's Office defrauded the State of Illinois by being paid, by means of interstate wire transfers, for hours they did not work:

a. Turner told the agents that he was not aware of Dinora or any other janitors' not being at work when they were supposed to be, when in fact he knew that Dinora and his crew were not always at work at such times; and

b. Turner told the agents that he had never told Dinora that he would watch Dinora's back and cover for Dinora, when in fact Turner had made such statements to Dinora on at least one occasion, including telling Dinora on August 9, 2005, "I got your back." Additionally on September 22, 2005, when the following statements were made:

Dinora: You know I haven't been at work all the time, in the past.

Turner: Yeah. But they don't know that. They don't know that, but you at work now.

. . .

That's all, hey. That's all the [expletive removed] you gotta worry about.

Dinora: But, you always covered my back. I mean, I . . . .

Turner: Yeah. Ain't nobody asked me nothing about that. Ain't nobody asked me nothing about that.

. . .

That ain't, that hasn't even come up. What they're doing is their investigation, now . . . which ain't [expletive removed].

. . .

All you gotta do, when you leave there, you put in a slip. Like I told you.

Dinora: Well, that's another problem. I'm gettin' a little low on time. Are we, you think we're ever gonna go back to the old days or . . .

Turner: [Expletive removed]. Well, I don't know . . . 'til they get done with their investigation . . .[laughs] yeah.

You ain't gonna get fired. [Laughs]. Then what the Inspector General would do is they would go and do the investigation, and once they complete the investigation, they send it to the director for his decision as to what happens. They don't make no recommendations. All they can do is complete their investigation.

. . .

Dinora: I mean, you've always, you've always covered my back.

Turner: Hey, hey, I know that. And I'm bein' straight with ya . . . don't you [expletive removed] tell nobody that you and I talked about that [expletive removed]. . . 'cause that'll get my [expletive removed] in a sling.

. . .

> I told you I'd cover your [expletive removed], but now, it's like you gotta cover your [expletive removed].
> . . .
> Okay? And if [expletive removed] gets back to normal, then, I'll let you know then.

All in violation of Title 18 U.S.C. § 1001.

A TRUE BILL,

s/ Foreperson
FOREPERSON

s/ Rodger A. Heaton
RODGER A. HEATON
UNITED STATES ATTORNEY

PJC/GMG